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In the Supreme Court of the United States

OCTOBER TERM 1958

No. 495

WORCESTER NORTH SAVINGS INSTITUTION,
PLAINTIFF, APPELLEE,

v.

SOMERVILLE MILLING COMPANY,
MacNEIL BROS. COMPANY,
ANGUS M. MacNEIL,
JOSEPH A. MacNEIL,
UNION HEIGHTS OIL CO., INC.,
JOHN E. DORIS,
JAMES T. MacNEIL,
DONALD M. MacNEIL,
DEFENDANTS, APPELLANTS.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of New Hampshire entered June 6, 1958 decided May 29, 1958, dismissing or overruling the exceptions of the defendants. They submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinion Below

The opinion below is reported in 141 A 2nd 885. Copy of said opinion is attached hereto as Appendix B.

Jurisdiction

This suit was brought in the Superior Court of New Hampshire. Decree was entered for the plaintiff. Appeal was duly taken to the Supreme Court of New Hampshire. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1257 (2) (3).

Questions Presented

1. The effect of the Soldiers and Sailors Civil Relief Act upon the facts in this case. Whether or not compliance by the Plaintiff with said Act is a prerequisite to the validity of a foreclosure of a mortgage of real property in which persons in the armed services have an interest.

2. The denial by the State Courts of New Hampshire to give full faith and credit to the decrees and judgments of the Courts of the Commonwealth of Massachusetts.

3. The denial of the requisites of the Bankruptcy Act of the United States by the State Courts of New Hampshire.

4. The reviewing without due process decisions ex post facto on matters already adjudicated by a Court of competent jurisdiction of another State.

5. The denial by the Courts of New Hampshire of due process of law by adjudicating rights of persons not made parties and given notice and opportunity of being heard.

Statutes Involved and Constitutional References

Bankruptcy Act U.S.C. Title 11. Sections

United States Constitution Amendment Fourteen.

United States Constitution (full faith and credit clauses)

U.S.C. Title 50 App. Section 532.

The Statement of Facts and the statement of the allegations that the issues involved are substantial.

Statement of Facts by the Appellants

The Somerville Milling Company, a Massachusetts corporation, gave to the Plaintiff in 1950 a real estate mortgage in the usual form covering a certain parcel of land with the buildings thereon located in Brookline, N. H. The mortgagor thereafter conveyed the said parcel to MacNeil Bros. Company, a Massachusetts corporation. Thereafter the said MacNeil Bros. Company conveyed the said parcel to the Union Heights Oil Company, a Massachusetts corporation. All of said transfers were made subject to the aforesaid mortgage held by the plaintiff. Prior to 1955 a second mortgage was given on said real estate to several persons, all Massachusetts citizens, among whom were Donald M. MacNeil, James T. MacNeil and John E. Doris. The said mortgage was never recorded, but prior to the attempted foreclosure sale mentioned herein later, notice of said mortgage was given to the Plaintiff. The three individuals named above, were members of the armed forces of the United States. That on July 20, 1955 the plaintiff caused notices of foreclosure to be inserted in the newspapers, for the purported breach of the conditions of the said mortgage. The dates of publication were July 23, July 25 and August 1, 1955 and the scheduled date of sale August 25, 1955. Copies of said notice were mailed to the original maker of the mortage and note, the endorsers; and to MacNeil Bros. Company as subsequent holder of the equity in said real estate. No notice was given to the present title holder of the premises, Union Heights Oil Company, although its deed had been duly recorded months prior to said publication. Nor was any notice mailed to Donald M. MacNeil, James T. MacNeil or John E. Doris.

Thereafter, on August 24, 1955 the defendants, John E. Doris, James T. MacNeil and Donald M. MacNeil, filed a bill in Equity seeking to restrain the foreclosure sale. On the return of the order of notice with temporary restraining orders, the Court refused to issue an interlocutory injunction. The case was never tried upon its merits.

The plaintiff first learned on October 18, 1955 of the transfer of title to Union Heights Oil Company, although the deed to said corporation had been duly recorded on February 18, 1952 at the Registry of Deeds for Hillsborough County, New Hampshire.

A Petition for redemption from the mortgage had been filed at the Superior Court for the County of Middlesex, Massachusetts on October 18, 1955 under the provisions of the General Laws of the Commonwealth of Massachusetts; Chapter 244.

The Plaintiff is a Massachusetts corporation. It appeared generally to said suit in the Superior Court as aforesaid case #19282. Said suit has not yet been reduced to a decree.

The Plaintiff brought a suit in the Superior Court for Worcester County, Massachusetts in January 1955 seeking leave to foreclose the subject mortgage under the provisions of the Federal Soldiers and Sailors Civil Relief Act, U.S.C. Title 50 App. Section 532 et seq. The said Court issued notice to the original mortgagor and several of the present defendants not including the Union Heights Oil Company. The defendants in the armed services were denied leave to intervene and have their rights determined in said suit.

Thereafter, prior to September 1955 a so-called final decree was entered in said suit 112664. That after the said Court vacated the final decree as aforesaid, the Plaintiff herein applied to the said Court on August 27, 1956 or thereabouts by motion seeking leave to foreclose the

mortgage subject matter of this suit and in which this present suit it is contending that it had already validly foreclosed the same mortgage. That thereafter the Superior Court for the County of Worcester, Massachusetts, entered a final decree granting to the present plaintiff the right in terms to foreclose the said mortgage. This long after this present suit had been entered in this Court. The said decree necessarily determined the fact that there was a valid mortgage in existence unforeclosed and subject to foreclosure.

On November 1, 1955 about one o'clock in the afternoon an involuntary petition in bankruptcy was filed in the United States District Court for the District of Massachusetts against the title holder of the subject real estate, Union Heights Oil Company. The Plaintiff was immediately notified and about one o'clock, it had received actual notice of the said filing of said petition. The alleged sale was thereafter held without special authority from the said Bankruptcy Court. The said petition is still pending, no adjudication or dismissal was ever made by said Court. The case is numbered at said Court 704-55. On November 1, 1955, the Plaintiff caused a so-called foreclose to be made under the aforesaid conditions. No notice of these conditions was publicized at the time and place of said alleged sale. The above are the highlights of the factual basis of this review. Other facts will appear in the arguments of counsel.

I

The alleged foreclosure sale was invalid and void for the reason that: The Union Heights Oil Company, not the named defendant (Union Heights Oil Co., Inc.) was never served with process in this case and did not appear voluntarily before the Court. R. p. 66, line 30, line 40.

In the absence of service of process and opportunity to

be confronted with the allegations made before being subjected to any decree is a denial of due process of law. See *Windsor* v. *McVeigh* in 93 U.S. Reports.

II

The sale was illegal and void for the reason that there was no notice to the title owner of the property to be foreclosed in accordance with the requirements of statute. See R.S.A. 579; 25. No notice of any kind was given to the representative of the mortgagor as required even though the plaintiff was advised of the said corporation owning the said real estate by the Petition for redemption filed in October 1955 at Middlesex County Superior Court to which petition the Plaintiff herein responded by general appearance long before the date of the sale. R. p. 53, lines 20-25. The defendants request the Court to take judicial notice of all proceedings in the Courts of Massachusetts State and Federal referred to in all parts of the brief herein. The said suit at Middlesex County is numbered 19282 eq.

The deed to the said owner was duly recorded in February 1952. R. p. 18, lines 30-35.

The life of the owning corporation under Massachusetts law extends for three years after dissolution and thereafter until pending litigation is terminated. See G. L. c. 162, section 31; see R. p. 46, lines 20-24.

III

The sale is illegal and void for the reason that: The Courts of New Hampshire must give full faith and credit to the judicial actions of the Courts of Record of the other states of the United States. The Superior Court for Worcester County in case 112664 had under its jurisdiction the necessary parties hereto and the subject matter before the Courts of New Hampshire stepped in. The said

Courts of New Hampshire must stay their hand while the Courts of Massachusetts are operating. The Constitution of the United States demands full faith and credit.

The Superior Court of Worcester County on September 11, 1956 in said case 112664 there pending determined in effect that the mortgage was still in existence and subject to being foreclosed. This is contrary to the prayers of the Plaintiff herein. He is asking the Courts of New Hampshire to reverse by collateral proceedings the decrees of the Superior Court of Massachusetts in a matter within its jurisdiction. This is contrary to the requirements of the Constitution pertaining to full faith and credit. See R. p. 75, lines 10-40 and exhibits.

IV

The sale was illegal and void for the reason that the title to said real estate subject of said mortgage came under the protective umbrella of the Bankruptcy Court of the United States for the District of Massachusetts on November 1 at 1:30 p.m. and notice was immediately given to the plaintiff. Thereafter it was powerless to foreclose without specific leave of the Bankruptcy Court. Said leave has never been granted by said Court. See case 704-55 there pending. See *Meyer* v. *Rosen*, 181 F.2nd 715; Bankruptcy Court under the Statute acquired exclusive jurisdiction of the property of the debtor and foreclosure proceedings were automatically stayed by statute and foreclosure sale made thereafter is absolutely void. It will be noted that prior to the changes in the law in 1938 a different construction was given to certain clauses in the said Act.

V

The sale is illegal and void for the reason of failure of the plaintiff to obtain prior approval under the Soldiers

and Sailors Civil Relief Act. U.S.C. Title 50, Section 532.

The defendants, Donald M. MacNeil, John E. Doris and James T. MacNeil were beneficiaries of the said Act. No leave was obtained from the Superior Court of Hillsborough County nor from the U.S. District Court for the District of New Hampshire. Thereafter the sale is void. See *Twitchell* v. *Home Owners Loan Corporation*, 122 P2nd 210.

The Plaintiff could not take the law into his own hands and disregard the mandate of the People of the United States; nor can this Court legalize the illegal acts of the Plaintiff. The said Courts cannot imbue with life a right that does not have any vitality in itself. The law was violated and the Plaintiff must stand the consequences of its known illegal acts. It acted with knowledge and therefore its Acts are the more inexcusable. The alleged foreclosure violated the said laws of the United States and therefore are acts which are completely void of legal effect. A person cannot predicate any rights in himself arising out of his own illegal conduct. Every act, which is criminal cannot constitute any basis for the establishment of legal rights. The foreclosure violating the provisions of Title 50 App. sec. 532 of the United States Code, is a void act.

VI

It is elementary that the first Court taking jurisdiction of the subject matter, cannot be interfered with by any subsequent tribunal, with the single exception of the U. S. Courts of Bankruptcy. The property subject matter of this litigation came into custodia legis of the Superior Court for Worcester County, Massachusetts by the voluntary submission of suit 112664 by the Petitioner herein, in January 1955. The said Court must be unhampered in its actions by the Superior Court of Hillsborough County, New Hampshire until at least after final decree is entered

in Worcester and the decree returned to Court as satisfied in full. Issue is not discussed here as to the right of the Courts of New Hampshire to render ancillary aid to the decree of the said Court in the enforcement thereof.

The property of the defendants being in custodia legis, this Court is without jurisdiction to adjudicate the rights litigated in Massachusetts.

VII

As the interests of the representatives of the U. S. Court for Massachusetts may be involved in this suit, the Court is without power to hear and determine the issues herein without notice and opportunity to be heard being given to the said U. S. Court at Boston or the person constituting its representative in this matter in case 704-55 there pending. U. S. Constitution.

Conclusion

The Defendants-Respondents state in conclusion that the decision in this suit must be for dismissal of the Petition. There has been interference by the Courts of New Hampshire with the progress of litigation in the Courts of Massachusetts both State and Federal. The Plaintiff-Petitioner herein instituted most of it. It selected its forum and must be bound by the decrees of the Court by it selected. Furthermore, the Courts of New Hampshire as all other State Courts are bound to enforce and uphold the Federal Laws and Constitutiton. They must give way to the exclusive jurisdiction of the U. S. Courts in matters of Bankruptcy. Therefore, the attempted foreclosure while the subject property was in custodia legis is void and confers no rights upon the Plaintiff.

There is no issue raised of adequate notice being received by the Plaintiff concerning the suits in Massachusetts and therefore it cannot claim to be the innocent victim

of unknown circumstances. It deliberately violated the laws of the State and Nation and now is seeking relief from the effects necessarily flowing from said violations. This would be beyond the powers of the Court.

All in all the Petition should be abated and a decree entered dismissing the suit forthwith on each and every ground stated herein.

Respectfully submitted,

(s) ANGUS M. MACNEIL

Counsel for Petitioners

Appendix A.

UNITED STATES CONSTITUTION

ARTICLE IV, SECTION 1:

> Full faith and credit shall be given in each State to the public acts, Records and Judicial Proceedings of every other State. And Congress may by General Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof.

AMENDMENT FOURTEEN, SECTION 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE TITLE 11, CHAPTER 7, SECTION 110 excerpt therefrom

> a) The trustees of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or as of the original petition proposing an arrangement or plan under this Act except . . . (not material)
>
> . . . A person having actual knowledge of such pending bankruptcy shall be deemed not to act in good faith unless he has reasonable cause to believe the petition in bankruptcy is not well founded . . .

UNITED STATES CODE TITLE 50 APP., SECTION 532 (3)

> No sale, foreclosure or seize of property for nonpayment of any sum due under any such obligation, or

for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein or otherwise, shall be valid if made after the date of enactment of the Soldiers and Sailors Civil Relief Act Amendments of 1942 and during the period of military service or within three months thereafter, except pursuant to an agreement as provided in Section 107 (Section 517 of this Appendix) unless upon an order previously granted by the Court and a return thereto made and approved by the Court.

Appendix B.

A True Copy.
Attest: GEORGE J. SHOWVAN
Clerk of the New Hampshire Court

Hillsborough,
No. 4651.

WORCESTER NORTH SAVINGS INSTITUTION
v.
SOMERVILLE MILLING COMPANY & a.

Argued May 6, 1958.
Decided May 29, 1958.

BILL IN EQUITY, to quiet title to certain real estate located in the town of Brookline in this state. RSA 498:3. The plaintiff obtained title to the real estate at a foreclosure sale under its power of sale mortgage executed by the named defendant by Angus M. MacNeil, president, to the plaintiff. Trial by the Court resulted in findings and rulings that the plaintiff's mortgage, foreclosure sale and foreclosure deed were valid, and that various mortgages, recorded and unrecorded, of the defendants were junior and inferior to the fee simple title of the plaintiff. The Court's decree also stated that the plaintiff's title to the real estate was free, clear and discharged of all claims of all defendants.

One of the defendants, Angus M. MacNeil, appeared as attorney for all the defendants. The defendants filed a plea in abatement, a motion to dismiss *sua sponte*, a motion for dismissal of action, a motion "to vacate decrees and dismiss petition" and a motion to "dismiss proceedings as adjudicated." The defendants' exceptions to the denial of these motions and the Court's decree were reserved and transferred by *Grant*, J. Additional facts appear in the opinion.

Burns, Calderwood, Bryant & Hinchley (*Mr. Calderwood* orally), for the plaintiff.

Angus M. MacNeil (by brief and orally), *pro se*, and for the other defendants.

KENISON, C.J. It is hornbook law that the validity and effect of conveyances and mortgages of real estate are determined by the law of the state where the real estate is located. Goodrich, Conflict of Laws (3d *ed.*) *ss.* 148, 152. The same rule is applied to the validity, method and effect of a mortgage foreclosure. N.H. Anno. Restatement, Conflict of Laws, *s.* 227; 2 Beale, Conflict of Laws, *s.* 227.1. The fact that the corporate defendants were organized in Massachusetts and that the other defendants are resident therein is clearly immaterial since the proceeding to quiet title is local in character and governed by the law of this state. *Bancroft* v. *Conant*, 64 N.H. 151. The Trial Court correctly ruled that New Hampshire was the proper jurisdiction to determine the validity of the mortgage foreclosure which was the basis of the plaintiff's title. *Bryant* v. *Morrison*, 44 N.H. 288.

The defendants claim the foreclosure sale is void because the last title owner of the property, Union Heights Oil Company, did not receive notice of the sale. After the named defendant, Somerville Milling Company, had mortgaged the property to the plaintiff, it conveyed its interest by a deed bearing no revenue stamps to MacNeil Bros. Company. Later MacNeil Bros. Company conveyed its interest by deed bearing no revenue stamps to Union Heights Oil Company. The defendant, Angus M. MacNeil, was president and director of these three corporations. The Union Heights Oil Company as well as the Union Heights Oil Company, Inc. had been dissolved by decree of the Supreme Judicial Court of Massachusetts in 1954, prior to the foreclosure sale on November 1, 1955. It is undisputed that notice of the foreclosure sale was sent to

the mortgagor, Somerville Milling Company, and as a matter of law that was sufficient. RSA 479:25 II; *Armille* v. *Lovett*, 100 N.H. 203.

As a matter of recommended procedure the record shows that notices were also sent to MacNeil Brothers Company, Angus M. MacNeil, and to the Union Heights Oil Company by sending the notice "to Angus M. MacNeil, the last president of Union Heights Oil Company before its dissolution." *Armille* v. *Lovett, supra.* This was notice above and beyond the call of legal duty. Pertinent but not definitive of this point is the holding in *State* v. *Cote*, 95 N.H. 108, 112: "If the defendant . . . chose to do business under a myriad of interlocking trade-names and corporations and kept the records so combined and inter-related that they cannot be distinguished, he cannot complain because they are treated as basically impersonal and corporate rather than personal and private." The defendants' exception based on lack of proper notice is without merit.

Another argument advanced by the defendants in their brief is quoted in full: "The alleged foreclosure sale was invalid and void for the reason that; The Union Heights Oil Company, not the named defendant (Union Heights Oil Co. Inc.) was never served with process in this case and did not appear voluntarily before the Court. R. p. 66 line 30—line 40. In the absence of service of process and opportunity to be confronted with the allegations made before being subjected to any decree is a denial of due process of law. See Windsor v. McVeigh in 93 U.S. Reports." The argument is in effect that the bill in equity named the wrong defendant and therefore the proceedings are invalid as against the holder of the equity of redemption. The answer to this is that the Trial Court could and did allow an amendment to correctly name Union Heights Oil Company as party defendant. *Bourget* v. *Company*, 97 N.H. 193, 194; *Remick* v. *Company*, 82 N.H. 182, 184.

The attorney for the defendants was president, director and organizer of both corporations and it could be found that justice required the action taken.

It is claimed that the defendants Donald M. MacNeil, John E. Doris and James T. MacNeil, as holders of an unrecorded second mortgage, are beneficiaries under the Soldiers and Sailors Civil Relief Act, 50 U.S.C.A., (app.) *s.* 532, and that foreclosure sale is in violation of this statute. The mortgage has not been produced in court, there is no evidence that these defendants are in the military service and there are no facts showing that the statute is applicable to this case. Consequently there is no basis for this court to make any determination under the statute.

Various other objections are urged by the defendants to the effect that the New Hampshire court has no jurisdiction of this proceeding to quiet title. However, they are predicated on statements and arguments of counsel rather than evidence except for preliminary and inadequate documents which fail to show any lack of jurisdiction or erroneous rulings by the Trial Court. All the defendants' exceptions have been considered but we find nothing in the record to indicate that they should be sustained. Accordingly the order is

Exceptions overruled.

All concurred.

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October Term, 1958

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ANGUS M. MACNEIL, JOSEPH A. MACNEIL,
UNION HEIGHTS OIL COMPANY, INC.,
JOHN E. DORIS, JAMES T. MACNEIL,
DONALD M. MACNEIL

Defendant Appellants

v.

WORCESTER NORTH SAVINGS INSTITUTION

Plaintiff Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

APPELLEE'S MOTION TO DISMISS

BURNS, CALDERWOOD, BRYANT & HINCHEY

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JOHN E. DORIS, JAMES T. MACNEIL,
DONALD M. MACNEIL

Defendant Appellants

v.

WORCESTER NORTH SAVINGS INSTITUTION

Plaintiff Appellee

APPELLEE'S MOTION TO DISMISS

The Worcester North Savings Institution, Appellee in the above-entitled action, moves to dismiss the Appellants' appeal on the grounds that:

(a) The appeal is not taken in conformity with statute or rules of the Supreme Court of the United States.

(b) This appeal does not present a substantial federal question.

(c) The Federal question sought to be reviewed was not timely or properly raised.

(d) The Federal question sought to be reviewed was not expressly passed on.

Preliminary Statement

This action originated as a Bill in Equity to quiet title to real estate located in Brookline, N. H., which was brought by the plaintiff-appellee against the defendant-appellants in the Hillsborough County Superior Court of the State of New Hampshire. The appellee obtained title to the real estate by a foreclosure sale under its power of sale mortgage executed by Somerville Milling Company by its President, Angus MacNeil. Trial by court with the decree that the appellee's title to real estate was free, clear and discharged of all claims of the appellants, as more particularly shown by the record.

Transferred to the Supreme Court of the State of New Hampshire on the appellants' exceptions which were overruled by the Supreme Court on May 29, 1958. Reported A 2d. 101 N. H. 307.

Notice of appeal to the Supreme Court of the United States was filed by the appellants with the Clerk of the Supreme Court of the State of New Hampshire on September 2, 1958.

Statement of Facts

On November 1, 1950, Somerville Milling Co., by Angus M. MacNeil, President, borrowed the sum of $30,000 from Worcester North Savings Institution with interest at 5% per annum, payable in equal monthly installments of $325.60 each, beginning December 1, 1950, to be applied first to interest then due, and the remainder to principal, the whole sum to be due and payable in or within ten years at the office of the institution, said note being endorsed by Angus M. MacNeil and Joseph A. MacNeil individually, waiving demand, notice and protest, said promissory note being secured by a certain power of sale mortgage on real estate owned by Somerville situate on the westerly side of Main Street and on the easterly side of Baboosic Road in Brookline, County of Hillsborough

and State of New Hampshire, by deed dated November 1, 1950, recorded in Hillsborough County Register of Deeds, November 1, 1950, at 2:08 P. M. in Book 1273, Page 385 (R. p. 17, exhibits 1 and 2).

Somerville conveyed its interest in this real estate, subject to the mortgage, to MacNeil Bros. Company by deed dated May 8, 1951, recorded Hillsborough Register of Deeds, May 8, 1951, at 1:25 P. M. Book 1288, Page 490 (R. p. 18, exhibit 3).

On December 14, 1951, MacNeil Bros. Company conveyed the premises to Union Heights Oil Company, Inc., by deed dated December 14, 1951, recorded Hillsborough County Register of Deeds on February 18, 1952, at 10 A. M. Book 1313, Page 127 (R. p. 18, exhibit 4).

Admittedly the mortgage was in default (R. p. 23, l. 17) and foreclosure proceedings were instituted by the petitioner which terminated in the sale of the property at a mortgage foreclosure sale on November 1, 1955, at which time the property was purchased by the Worcester North Savings Institution (R. p. 9).

ARGUMENT

I. The Appeal is not within the jurisdiction of this Court because it was not taken in conformity with statute or the rules of the Supreme Court of the United States.

The Jurisdictional Statement of the Appellants states in part as follows: "...the judgment of the Supreme Court of the State of New Hampshire entered June 6, 1958, decided May 29, 1958..." The date of June 6, 1958, does not appear anywhere in the records. The case was argued before the Supreme Court of the State of New Hampshire on May 6, 1958, and was decided by the filing of a written opinion with the Clerk of the Supreme Court of the State of New Hampshire on May 29, 1958.

New Hampshire RSA c. 490, s. 15 reads as follows:

> "Opinions; Notice. The justices shall file with the clerk a written opinion in every case decided by them, and the clerk shall at once notify the parties or their counsel, by mail, of the order made. No order of the court for a final disposition of a case pending therein shall be valid and binding until an opinion has been filed."

Under this statute the order of the Supreme Court became valid and binding as soon as the opinion was filed.

New Hampshire RSA c. 490, s. 16 applies only to situations in which further action is necessary in the Superior Court and has no application to the effective date of the opinion rendered by the Supreme Court. The effective date from which the appeal could be taken shall be calculated from May 29, 1958.

28 U. S. C. A. 2101 (c) reads as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review *shall* be taken or applied for *within* ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." (Italics supplied)

Ninety days from, but not including, May 29, 1958, would be August 27, 1958. The notice of appeal was not filed until September 2, 1958, or more than five days after the appeal period had expired. The notice of appeal was not in conformity with 28 U. S. C. A. 2101, and Rule 16 of the Supreme Court of the United States. The appeal must be dismissed.

II. This Appeal is not within the jurisdiction of this Court because

A. It does not present a substantial federal question;

B. The Federal question sought to be reviewed was not properly raised;

C. The Federal question sought to be reviewed was not expressly passed on.

The defendant appellant seeks to raise five federal issues. These will be taken up in order.

1. *Soldiers' and Sailors' Civil Relief Act.*

In argument before the trial court, but without any supporting evidence, the attorney for the appellants said that persons having a second mortgage on the property foreclosed were in the armed forces. The alleged mortgage was not recorded and it was not produced at the time of trial. The parties, who it was argued held the second mortgage, did not appear or testify, nor was their absence explained.

An Appellate Court does not consider any issue not presented by evidence contained in the transferred record from the trial court. The court said in *White v. Central Dispensary and Emergency Hospital*, 99 F. 2d 355, 359 (1938) 69 App. D. C. 122:

> "...A court of appeals cannot take judicial notice of what may appear upon the records of the subordinate courts within the boundaries of judicial jurisdiction; it can act only upon the facts appearing in the record before it." (Cases cited)

Furthermore, the provisions of Title 50 U. S. C. A. 532, do not apply to this situation. Paragraph (1) of this section reads as follows:

"(1) The provisions of this section shall apply only to obligations secured by mortgage, trustee, or other security in the nature of a mortgage upon real or personal property *owned* by a person in military service at the commencement of the period of military service and still so *owned* by him, which obligations originated prior to such person's period of military service." (Italics supplied)

It is perfectly obvious that second mortgagees do not *own* the premises subject to this mortgage. It was held in *Culver v. Superior Court in and for Los Angeles County*, 1954, 270 P. 2d 78, 125 C. A. 2d 76, that the beneficial owners of second mortgage, whether they were assenting creditors of mortgagor or assignees of such creditors, were not "owners" of the mortgaged property within this section, prohibiting foreclosure of mortgaged property during period of military service of owner, and could not invoke this section. In this case there is no evidence contained in the record to raise this issue and the record also discloses that no such evidence was ever presented.

The Supreme Court of the State of New Hampshire, in the next to the last paragraph of its opinion, after commenting on the absence of evidence to substantiate the claim said "Consequently there is no basis for this Court to make any determination under the statute."

2. *Denial of Full Faith and Credit to Decisions of Other States.*

The attorney for the appellants, in oral argument and by numerous motions addressed to the trial court, referred to actions pending in the courts of other states. However, no evidence was offered which properly presented this issue for consideration by the court. Arguments of counsel and pleadings do not constitute evidence.

The second section of 28 U. S. C. A. 1738 reads as follows:

> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the Clerk and seal of the Court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form."

A judicial record of one state cannot be proved or admitted in courts of another state as evidence of a fact until there has been a compliance with this section. *Wallace v. Herring*, Miss. 1949, 43 So. 2d 100 (28 U. S. C. A. 1738—Note 21). The courts of the State of New Hampshire insist that the federal requirements be complied with. *Folsum v. Blood*, 53 N. H. 434, 435.

There being no competent evidence of judicial proceedings pending in any other court, the trial court could not and did not give this issue any consideration. The Supreme Court of the State of New Hampshire, in the last paragraph of its written opinion, clearly indicates that the record of the trial court did not contain sufficient evidence of the claim to justify its consideration.

3. *Bankruptcy Act.*

It is difficult from the record to determine the provisions of the Bankruptcy Act relied upon by the appellants. Before the Supreme Court of the State of New Hampshire the appellants argued with reference to certain undesignated provisions of the Bankruptcy Act but cited in support of their argument *Meyer v. Rosen*, 181 F. 2d 715. The section interpreted by the *Rosen* case is 11 U. S. C. A. 801.

There is no evidence which properly proved before the trial court of the State of New Hampshire that a petition in bank-

ruptcy was ever filed and there is evidence that even if such a petition was filed it was not filed until after the foreclosure sale had taken place (R. p. 64-65).

Furthermore, even if it is found by this Court that a petition in bankruptcy was in fact filed, the provisions of the Bankruptcy Act upon which the appellants apparently rely in the State court do not apply to corporations. The case of *Meyer v. Rosen*, 181 F. 2d 715, cited by the appellants in the Jurisdictional Statement (Section IV) involved persons rather than corporations and is under the provision of the Bankruptcy Act concerning real property arrangements. 11 U. S. C. A. 801 and following. These provisions by their terms do not apply to corporations. 11 U. S. C. A. 806 (6) reads in part as follows: "(6) 'debtor' shall mean a person, *other than a corporation...*" Consequently, the provisions upon which the appellants rely are inapplicable.

The appellants now cite in the Jurisdictional Statement U. S. Code Title 11, c. 7, s. 110 (11 U. S. C. A. 110). This section is concerned with the vesting of title to property in the trustee. There is no evidence in the record that a trustee was ever appointed so this section has no application.

Title to real estate remains in the bankrupt until a trustee is appointed. 11 U. S. C. A. 110 (see notes 41-90, see Note 46-47). A foreclosure sale of real estate is not invalid if made in conformity with State Laws even though an involuntary petition in bankruptcy is filed between the date of publishing notice of foreclosure and the date of sale. This sale is valid even though the mortgagee purchases at the sale. 11 U. S. C. A. 110, Note 51. *Robinson v. Kay*, 7 F. 2d 576.

11 U. S. C. A. 28 does not apply for this section but its terms apply only to suits founded on a claim from which a discharge in bankruptcy would be a release. Consequently the provisions upon which the appellants rely are inapplicable.

4. *Reviewing without due process decisions ex post facto on matters adjudicated by a court of competent jurisdiction in another state.*

There is no probative evidence in the record of any adjudication by courts in another state. The attorney for the appellants, by motion and in argument, indicated that there were proceedings in other states. However, these proceedings were not proved in accordance with the second section of 28 U. S. C. A. 1738 (*supra*). Consequently, there is no probative evidence for the court to consider on this issue.

5. *The denial of the courts of New Hampshire of due process of law by adjudicating rights of persons not made parties and given notice or opportunity of being heard.*

The real estate subject to the mortgage was located in Brookline, County of Hillsborough, State of New Hampshire. A bill in equity to remove cloud from and to quiet title is local in character. In *Bancroft v. Conant*, 64 N. H. 151 the court said:

> "This is a bill in equity to remove a cloud upon the title to real estate within the jurisdiction of the court. It is in the nature of a proceeding in *rem* and local in its character, and the court has jurisdiction of the subject-matter of the controversy. Actions for the recovery of real property, or for the determination of an interest therein, are local, and conflicting titles and rights to the possession of lands must ordinarily be determined by the courts of the state wherein the lands lie; and whether the relief is sought at common law or in chancery, the rule of jurisdiction equally applies."

Notice of the foreclosure proceedings were mailed to Angus M. MacNeil, Summerville, and to MacNeil Brothers, as well as others, on August 2, 1955 (R. p. 34, l. 18). Notice was sent to Union Heights Oil Company before the foreclosure sale

(R. p. 37, l. 15). In any event, notice was sent to the Mortgagor Somerville in each instance (R. p. 33, 35, 36, 37). Under R. S. A. c. 479, s. 25 III the title owner or owners of the property are not entitled to notice of the sale provided the mortgagor receives notice. *Armille v. Lovett*, 100 N. H. 203 considered the rights of anyone interested in mortgaged property to receive notice of a power of sale foreclosure proceeding. In considering this the court said, page 205:

> "Unless the power of sale mortgage or the statute requires notice to junior lienors a power of sale foreclosure is valid with notice only to the mortgagor. This rule has been established for a long time and applies to the instant case. *Scott v. Paisley*, 271, U. S. 632; *Watkins v. Booth*, 55 Colo. 91. The rule is set forth in 4 American Law of Property, s. 16, 207, p. 507 (1952) as follows: 'When notice is of the personal variety, unless it is required by the terms of the power itself or by statute, it does not have to be given to anyone other than the mortgagor.' We conclude that the defendants as attaching creditors (*Felker v. Hazelton*, 68 N. H. 304, 305) were not required to be given the same notice as the mortgagor and that the failure to do so did not affect the validity of the foreclosure sale.
>
> "It may be true that the careful conveyancer, for the protection of the mortgagee, generally will notify junior lienors and this course of procedure has been recommended by an acknowledged authority even though not required by statute. See 1 Glen, Mortgages, s. 110. 1 p. 671 (1943): 'But the better method, I suggest, is a general requirement that the junior encumbrancer shall receive the same sort of notice that the mortgagor gets, whatever that may be.' See also, Forum on Title Examinations on 9 Proc. N. H. Bar Assn. (new series no. 2) 51-52 (1952). While it is not a statutory prerequisite to the validity of the title conveyed on foreclosure, this

recommended procedure may be additional evidence that the mortgagee has performed his duty to the mortgagor to exercise good faith and due diligence in conducting the mortgage foreclosure. *Pearson v. Gooch*, 69 N. H. 208, *Wheeler v. Slocinski*, 82 N. H. 211."

All necessary parties were either notified or they were not entitled to notification.

CONCLUSION

The appeal to this court from the order of the Supreme Court of the State of New Hampshire should be dismissed because,

(a) The appeal is not taken in conformity with statute or the rules of the Supreme Court of the United States;

(b) This appeal does not present a substantial federal question;

(c) The Federal question sought to be reviewed was not timely or properly raised;

(d) The Federal question sought to be reviewed was not expressly passed on.

Respectfully submitted,

WORCESTER NORTH SAVINGS INSTITUTION

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In the
Supreme Court of the United States

OCTOBER TERM, 1958

No. 495

SOMERVILLE MILLING COMPANY, ET AL.,
DEFENDANTS, APPELLANTS,

v.

WORCESTER NORTH SAVINGS INSTITUTION,
PLAINTIFF, APPELLEE.

APPELLANTS' MOTION TO STRIKE APPELLEE'S MOTION TO DISMISS (a)

Now come the Defendants, Appellants in the above entitled action and state that the Appellee has included in its motion to dismiss under (a) thereof, certain contentions of fact that do not appear to be sustained by the record in this case. That the excerpt of the law quoted in its said motion on page 4 thereof at the top of the page appears to be a correct quotation. That the decision in this case may well have been made by the members of the Court on May 29, 1958 but the said opinion does not appear to have been filed at the said time but rather was filed about June 6, 1958. That if the said Court had included in its record for transmission to this Court a copy

of the docket as requested, it would appear that the said filing did not occur on May 29, 1958.

Wherefore, your Defendant, Appellants respectfully move that the said paragraph (a) of the Appellees Motion to Dismiss be stricken as uncorroborated by the record. As to the other points raised by the Motion to Dismiss they appear to be adequately answered by the appeal itself and record filed and jurisdictional statement contents.

By their attorney,

(s) ANGUS M. MACNEIL
547 Somerville Avenue,
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Copy mailed to Burns, Calderwood and Bryant, Esqs. counsel for the Plaintiff, Appellee this sixth day of January 1959.

(s) ANGUS M. MACNEIL